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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 ROBERT WALZ,

Civil No. 07-1094-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15 _____
16 Rory Linerud
17 Linerud Law Firm
18 PO Box 1105
19 Salem, Oregon 97308
20 Attorney for plaintiff

21 Karin Immergut
22 United States Attorney
23 District of Oregon
24 Britannia Hobbs
25 Assistant United States Attorney
26 1000 S.W. Third Avenue
27 Portland, Oregon 97204-2902

28 David M. Blume
Special Assistant U.S. Attorney
Social Security Administration
701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7075
Attorneys for defendant

AIKEN, Judge:

Claimant, Robert Walz, brings this action pursuant to the
Social Security Act (the Act), 42 U.S.C. §§ 401 and 1381-83f, to

1 obtain judicial review of a final decision of the Commissioner
2 denying his application for disability insurance benefits under
3 Title II of the Act and for Supplemental Security Income (SSI)
4 disability benefits under Title XVI of the Act. For the reasons
5 set forth below, the Commissioner's decision is affirmed and this
6 case is dismissed.

7 **PROCEDURAL BACKGROUND**

8 Plaintiff alleged disability beginning March 10, 2004, due
9 to back problems and congenital upper extremity deformity. Tr.
10 79-80. The Commissioner denied plaintiff's applications
11 initially and on reconsideration. In February 2007, an
12 administrative law judge (ALJ) held a hearing to consider
13 plaintiff's application for disability. Tr. 276-98. On March
14 21, 2007, the ALJ issued a decision finding plaintiff not
15 disabled under the Act. Tr. 12-22. On June 13, 2007, the
16 Appeals Council denied plaintiff's request for review, tr. 5-7,
17 making the ALJ's decision the Commissioner's final decision. 20
18 C.F.R. §§ 404.981, 416.1481, 422.210. On July 27, 2007,
19 plaintiff filed the complaint at bar. The relevant period under
20 review begins March 10, 2004, plaintiff's alleged disability
21 onset date, to March 21, 2007, the date of the ALJ's decision.

22 **STATEMENT OF THE FACTS**

23 Plaintiff was born in 1982. Tr. 63. He was 21 years old
24 when he allegedly became disabled in March 2004, and 24 years old
25 when the ALJ issued his March 2007 decision. Plaintiff graduated
26 from high school and has worked as a telephone solicitor, fast-
27 food worker, kitchen helper, gas-station attendant, industrial
28 cleaner, and telephone sales representative. Tr. 280, 295. The

1 record indicates plaintiff worked part-time as a cashier for
2 Burger King in 2006, and as a customer-service representative for
3 Qwest in 2006 and 2007. Tr. 282-84.

4 Plaintiff was born with upper extremity deformities
5 including no thumbs or forearms. The medical records state:
6 "considerable gross abnormalities of the ulnar carpal joint and
7 loss of several of the carpal bones. Scanning x-rays would
8 suggest that there are only 4 carpal bones out of a standard
9 eight." Tr. 170.

10 STANDARD OF REVIEW

11 This court must affirm the Secretary's decision if it is
12 based on proper legal standards and the findings are supported by
13 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
14 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
15 mere scintilla. It means such relevant evidence as a reasonable
16 mind might accept as adequate to support a conclusion."
17 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
18 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
19 The court must weigh "both the evidence that supports and
20 detracts from the Secretary's conclusions." Martinez v. Heckler,
21 807 F.2d 771, 772 (9th Cir. 1986).

22 The initial burden of proof rests upon the claimant to
23 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
24 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
25 an "inability to engage in any substantial gainful activity by
26 reason of any medically determinable physical or mental
27 impairment which can be expected . . . to last for a continuous
28 period of not less than 12 months. . . ." 42 U.S.C.

1 § 423(d)(1)(A).

2 The Secretary has established a five-step sequential
3 process for determining whether a person is disabled. Bowen v.
4 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
5 416.920. First the Secretary determines whether a claimant is
6 engaged in "substantial gainful activity." If so, the claimant
7 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
8 §§ 404.1520(b), 416.920(b).

9 In step two the Secretary determines whether the claimant
10 has a "medically severe impairment or combination of
11 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
12 §§ 404.1520(c), 416.920(c). If not, the claimant is not
13 disabled.

14 In step three the Secretary determines whether the
15 impairment meets or equals "one of a number of listed impairments
16 that the Secretary acknowledges are so severe as to preclude
17 substantial gainful activity." Id.; see 20 C.F.R.
18 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
19 presumed disabled; if not, the Secretary proceeds to step four.
20 Yuckert, 482 U.S. at 141.

21 In step four the Secretary determines whether the claimant
22 can still perform "past relevant work." 20 C.F.R.
23 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
24 disabled. If she cannot perform past relevant work, the burden
25 shifts to the Secretary. In step five, the Secretary must
26 establish that the claimant can perform other work. Yuckert, 482
27 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
28 (f). If the Secretary meets this burden and proves that the

1 claimant is able to perform other work which exists in the
2 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
3 416.966.

4 **DISCUSSION**

5 1. The ALJ's Findings

6 Regarding Step One, the ALJ found that plaintiff may have
7 engaged in substantial gainful activity in 2006 and 2007,
8 nonetheless, the ALJ proceeded with the sequential evaluation.
9 Tr. 16-17. Pursuant to Step Two, the ALJ found that plaintiff's
10 back disorder and upper extremity congenital deformity were
11 severe impairments. Tr. 17. Under Step Three, the ALJ found
12 that plaintiff's impairments did not meet or equal the
13 requirements of a listed impairment in 20 C.F.R. pt. 404, subpt.
14 P, app.1. Tr. 17. Regarding plaintiff's residual functional
15 capacity, the ALJ found that plaintiff could perform light work.
16 Id.; 20 C.F.R. §§ 404.1567, 416.967. At Step Four, the ALJ found
17 that plaintiff could not perform his past relevant work. Tr. 19.
18 Finally, at Step Five, the ALJ found that plaintiff was not
19 disabled because he could perform other work that exists in the
20 national economy such as a storage-facility rental clerk, call-
21 out operator, or surveillance-system monitor. Tr. 20. Plaintiff
22 alleges error based on the ALJ's Step Five finding arguing he is
23 unable to perform the identified occupations.

24 2. Vocational Expert's Testimony

25 Plaintiff argues that the ALJ relied on vocational expert
26 ("VE") testimony premised on a hypothetical question that
27 understated plaintiff's limitations. An ALJ must include all
28 limitations supported by substantial evidence in a hypothetical

1 question to the vocational expert, but may exclude unsupported
2 limitations and disregard vocational expert testimony premised on
3 such limitations. Bayliss v. Barnhart, 427 F.3d 1211, 1217-18
4 (9th Cir. 2005). Here, the ALJ identified three jobs someone with
5 plaintiff's residual functional capacity could perform: storage-
6 facility rental clerk, call-out operator, and surveillance-system
7 monitor. Tr. 296-97. The ALJ similarly found that plaintiff
8 could perform these occupations. Tr. 20. Plaintiff argues that
9 he is unable to perform these occupations due to his reaching,
10 grasping, pinching and keyboarding limitations. The Commissioner
11 concedes that the plaintiff could not perform the job of storage-
12 facility rental clerk as it requires frequent handling.
13 Plaintiff was limited by the ALJ to occasional handling. Tr. 17.
14 Neither the vocational expert nor the ALJ explained this
15 deviation. Tr. 17-18, 296-98. Therefore, remaining are two jobs
16 identified by the vocational expert that plaintiff could perform:
17 call-out operator and surveillance-system monitor.

18 Regarding the plaintiff's ability to reach, the ALJ did not
19 find limits on this ability. Tr. 17. A surveillance-system
20 monitor requires no reaching, and a call-out operator requires
21 only occasional reaching. See DOT 379.367-010, DOT 237.367-014.
22 The record indicates that plaintiff could reach occasionally.
23 Moreover, his previous jobs required at least occasional
24 reaching: fast-food worker (constant), DOT 311.472.010, telephone
25 solicitor (occasional), DOT 299.357-014, kitchen helper
26 (constant), DOT 318.687-010, gas station attendant (frequent),
27 DOT 915.477-010, industrial cleaner (frequent), DOT 381.687-018,
28 and telephone sales representative (occasional), DOT 253.257-010.

1 Finally, plaintiff's testimony, as well as his wife's testimony
2 was consistent with plaintiff's ability to reach occasionally.
3 Plaintiff testified he could not scrub his back, drive a stick
4 shift, or reach top shelves, but that he could make change and
5 sort papers without difficulty. Plaintiff is also able to
6 prepare bottles for his two-year-old son. Tr. 289, 291.
7 Plaintiff's wife testified that she reached high places for him,
8 took out his contacts, and did his laundry, but that he regularly
9 played video and board games. Tr. 293-94. I find that the ALJ
10 relied on sufficient evidence in the record to find that
11 plaintiff could reach occasionally and therefore perform the two
12 jobs identified by the VE.

13 The plaintiff next asserts that the ALJ erred in assessing
14 plaintiff's ability to grasp. The State agency reviewing
15 physician limited plaintiff to occasional handling, including
16 grasping. Tr. 166. The ALJ relied on the VE's testimony and
17 opinion as well as the testimony in the record of both plaintiff
18 and his wife regarding plaintiff's grasping and handling ability
19 and limitations. The ALJ relied on substantial evidence in the
20 record to limit plaintiff to occasional handling. Tr. 17. The
21 VE testified that the call-out operator required only occasional
22 handling, and the surveillance-system monitor requires no
23 handling. Therefore, plaintiff's limitation to occasional
24 grasping or handling did not preclude these jobs.

25 Finally, plaintiff argues the ALJ erred in assessing his
26 ability to pinch and keyboard and that his deficit in those areas
27 precluded his performance of the identified occupations. The
28 State agency reviewing physician limited plaintiff to occasional

1 fingering (including keyboarding). Tr. 166. The ALJ also
2 limited plaintiff to occasional fingering and keyboarding. Tr.
3 17. A call-out operator requires occasional fingering, and a
4 surveillance-system monitor requires no fingering.

5 The ALJ relied on evidence in the record supporting
6 plaintiff's ability to "occasionally" finger such as his ability
7 to type 25 words per minutes, ability to make change, prepare
8 bottles for his son, and play video and board games. Tr. 285,
9 289, 291, 293. Also, plaintiff's previous occupations required
10 at least occasional fingering and often times more than
11 occasional: fast-food worker (frequent), kitchen helper
12 (occasional), gas station attendant (frequent), industrial
13 cleaner (occasional), and telephone sales representative
14 (occasional). There is no evidence or explanation in the record
15 as to why plaintiff was no longer able to occasionally finger
16 when he did so previously with his congenital impairments.
17 Therefore, the ALJ relied on substantial evidence in the record
18 to find that plaintiff had the ability to finger and/or keyboard
19 occasionally, and thus, perform the occupations of call-out
20 operator and surveillance-system monitor.

21 The ALJ properly relied on the VE's testimony to find that
22 plaintiff could perform other work existing in significant
23 numbers in the national economy.

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1 **CONCLUSION**

2 The Commissioner's decision is based on substantial
3 evidence, and is therefore, affirmed. This case is dismissed.
4 IT IS SO ORDERED.

5 Dated this 19 day of June 2008.

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9 /s/ Ann Aiken

10 Ann Aiken
11 United States District Judge
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